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No. 03-865

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

In Re EGRI

NANCY BURTON,

Petitioner,

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Introduction

In its responsive brief, the Respondent, Connecticut Yankee, does not contest the critical facts of this matter. Nor does the Respondent provide legal authority supporting the district court's jurisdiction under the All Writs Act to hold the Petitioner in contempt.

I. The Facts

Connecticut Yankee's brief does not contest the essential facts of record pertinent to the issues. In other respects, the brief is replete with factual misstatements.

A. Connecticut Yankee's concession of facts

The Respondent does not counter the Petitioner's statement of the following facts:

1. The district court did not conduct an evidentiary or other hearing in *Connecticut Yankee*.
2. The District court did not conduct a proceeding on the settlement before endorsing it as the Order on Consent of Parties.
3. The Order on Consent of Parties is a product of a private settlement negotiated between the Selectmen and Connecticut Yankee in *Connecticut Yankee*, to which neither the Petitioner nor her clients were parties.

B. Connecticut Yankee's Misstatements of Fact

Respondent's brief presents misstatements of fact, as follows:

1. *Egri* was not brought as a collateral challenge to the Order on Consent of Parties, as Respondent's brief asserts.[1]

2. In footnote 3, Connecticut Yankee asserts that the petitioner "makes several demonstrably false representations." This statement is incorrect.

a. The Petitioner did not suggest that the district court conducted an *ex parte* status conference with Connecticut Yankee.[2]

b. Contrary to Connecticut Yankee's statement, the town held only one informational meeting at which it withheld the settlement agreement.

c. The district court did not "express the view that Connecticut Yankee would prevail on the merits" in the previous litigation.

3. In footnote 4, Respondent states Petitioner misrepresented that the *Egri* plaintiffs own abutting property and they testified to the contrary. This is simply not true.[3]

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[1] In its prayer for relief, *Egri* sought to invalidate, pursuant to state law, the Selectmen's agreement with Connecticut Yankee to sell it a building permit, which the town could otherwise not issue lawfully, for $10 million.

[2] The petitioner correctly stated that the district court file contains an order to Connecticut Yankee's attorneys only for a status conference to take place on December 18, 2001, eight days before the Town appeared in the case.

[3] Plaintiff Andrew J. Egri testified that he was an abutter. His property adjoins that of Connecticut Yankee. As Egri testified, Connecticut Yankee placed his name on its lists of abutting property owners for purposes of complying with town notice requirements. Plaintiff Edward M. Munster owns property on the west bank of the Connecticut River, which is subject to tidal influence at such location, directly across from the site. For purposes of the state's inland wet-

4. In footnote 5, Connecticut Yankee has engaged in blatant misrepresentation.[4]

5. In footnote 6, Connecticut Yankee falsely asserts that "[t]he state court refused to allow Petitioner to proceed because of the federal injunction as well as the state court's concerns as to the plaintiffs' standing."[5]

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lands law, his interests are equivalent to those of an abutter. The district court and the Court of Appeals disregarded this evidence in error.

[4] In *Warmsley*, the plaintiffs submitted documentary and testimonial proof, through two experts, that Venture Smith owned the site in question based on ancient deeds and historical records. Indeed, Connecticut Yankee's own archaeologists testified under oath that they had uncovered pottery shards from the site in question which dated from the Venture Smith era, late 18th century. John W. Shannahan, Director of the Connecticut Historical Commission, had nominated the site to the National Register of Historic Places before *Warmsley* was instituted because of its association with Venture Smith. Shortly after the Petitioner noticed Shannahan's deposition in *Warmsley,* when the case was remanded to the state court because of the absence of federal jurisdiction, both Shannahan and his chief National Register staff assistant abruptly resigned from their positions. The assertions to the contrary in Connecticut Yankee's footnote 5 are simply false. The preponderance of attorney's fees imposed upon the Petitioner in the contempt order are attributable to proceedings in the district court on plaintiffs' application for a temporary injunction in *Warmsley* prior to its remand.

[5] The case did not proceed even after it was remanded because the district court ordered the Petitioner to withdraw it forthwith under threat of a severe monetary penalty which the district court stated it would impose upon her personally in accordance with orders proposed by Connecticut Yankee. The suit was withdrawn before the state court reached the issue of standing. Nevertheless, standing is automatic under state law upon verification that the site in question is eligible for listing on the National Register of Historic Places. *See* Conn. Gen. Stat. § 22a-19a.

II. Legal Argument

A. Sixth Circuit authority conflicts with the Second Circuit's conclusion that the All Writs Act, 28 U.S.C. § 1651, permits the district court to issue an injunction against a nonparty to aid in enforcement of a privately negotiated consent order.

The Respondent cites one case to distinguish this case from those relied upon by the Petitioner and it is the very case cited by the Court of Appeals below in rejecting the Petitioner's appeal to it, namely, *United States v. Int'l Brotherhood Of Teamsters*, 266 F.3d 45, 50 (2d Cir. 2001). The Respondent relies upon the following passage:

> The district court has sought not to bind appellants to the consent decree, but to enjoin them from acts that would frustrate the consent decree's operation on parties that are bound to the decree.

From this sentence, and without citing other authority, Connecticut Yankee makes the sweeping statement that "the All Writs Act authorizes federal courts to enjoin nonparties from frustrating the *implementation* of the consent order." (Emphasis in original.)

This argument is not legally informed. *Teamsters* did not involve a privately negotiated consent decree. Thus, its application is limited to cases in which a district court is actively involved in adjudicating the case, unlike the present case.

Respondent seeks to distinguish this case from the cases relied upon by the Petitioner on the grounds that "*City of Detroit* and *Retarded Citizens* imposed affirmative obligations under a consent judgment on a nonparty whereas the District Court in this case merely

prohibited Petitioner from collaterally challenging the Order."

This is a misstatement. In this case, the injunction by its terms barred plaintiff Andrew J. Egri from pursuing his appeal to town authorities under state law from the Selectmen's issuance of the building permit and it barred the Petitioner from acting as his attorney in such appeal. The injunction was also used as a device by which Connecticut Yankee was allowed to take away the legal rights of the Petitioner and her clients to bring meritorious suits under the state's Environmental Protection Act, to protect their rights and interests alongside Connecticut Yankee at town inland wetlands proceedings and to write letters to public officials.

An otherwise impermissible injunction imposed to enforce a consent order, which takes away a nonparty's legal rights and duties, is not made permissible just because it does not impose an "affirmative duty."

A consent decree entered by a federal court "is not a proper vehicle for extinguishing the legal rights and duties of third parties. . . . [It] is not to be used as a device by which A and B, the parties to the decree, can (just because a judge is willing to give the parties' deal a judicial imprimatur) take away the legal rights of C, a nonparty." *United States v. Board of Education*, 11 F.3d 668, 673-74 (7th Cir. 1993).

In this case, the injunction worked to extinguish the legal rights and duties of the Petitioner and her clients. The district court permitted Connecticut Yankee to extinguish the legal rights of the Petitioner, a nonparty to the consent order, by means of the injunction. Under the cases cited, the district court lacked the power to extinguish the Petitioner's legal rights and duties.

B. The consent order in *Connecticut Yankee* does not derive from federal law and thus could not properly provide the basis for the injunction in *Egri*.

As this Court recently reiterated, a federal consent decree "must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based." *Frew v. Hawkins*, ___ U.S. ___, 2004 U.S. LEXIS 664 (decided January 14, 2004), citing *Firefighters v. Cleveland,* 478 U.S. 501, 519 (1986).

In fact, the dispute in this case "legalized" conduct by the Selectmen which was beyond their legal authority under state law. The consent order frustrated, rather than furthered, the objectives of state law requirements involving building permits. The consent order could not properly provide the basis for a federal injunction against nonparties.

In construing a consent decree, the court is not entitled to expand or contract the agreement of the parties as set out in the decree. *Crumpton v. Bridgeport Educ. Assoc.*, 993 F.2d 1023, 1028 (2d Cir. 1993). An injunction should be narrowly tailored to give only the relief to which the plaintiff is entitled. *Califabo v. Yamasaki*, 442 U.S. 682, 702 (1979). The district court injunction was limited to the issue of the building permit, the sole object of the suit. The court lacked authority to enjoin Petitioner's conduct involving matters outside the pleadings in *Connecticut Yankee*, such as wetlands enforcement (*NORAD*) and historic preservation (*Warmsley*).

C. The Petitioner did not violate the injunction

The Respondent asserts that the Petitioner repeatedly violated the injunction the district court entered in *Egri*.

Yet, the Respondent's brief does not identify a single instance when the Petitioner improperly challenged the *building permit*, the narrow subject of the consent order.[6]

As a general rule, injunctions must be construed narrowly and ambiguities resolved *against* a finding of contempt. *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990). Such a rule reflects judicial recognition that the contempt power, even in its civil form, is a potent weapon. *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). The use of the contempt power "ought therefore to be confined to situations in which the defendant had clear notice that what he was doing violated a court order." *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 907 (7th Cir. 1995).

D. The Petitioner did not mount collateral attacks on the judgment.

The Respondent repeatedly asserts that the Petitioner mounted collateral attacks on the judgment by instituting *NORAD* and *Warmsley*. The Respondent asserts that *NORAD* and *Warmsley* are "actions expressly forbidden by the Permanent Injunction." However, the terms of the injunction do not "expressly forbid" state suits con-

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[6] The only acts found by the district court to have violated the injunction were the Petitioner's (a) institution of *NORAD*, a lawsuit challenging the validity of a wetlands permit, not the building permit, based on Connecticut Yankee's submission of an inaccurate and incomplete application to the wetlands commission; (b) institution of *Warmsley*, a lawsuit seeking a stay of excavation pending a comprehensive archaeological investigation having nothing to do with the building permit; (c) letter-writing to town officials concerning the applicability of wetlands law; and (d) an appearance at a public hearing of the wetlands commission alongside Connecticut Yankee's lawyers in which she advocated on behalf of her client, NORAD, that the wetlands laws be followed. None of these activities challenged the building permit itself and none violated the injunction.

cerning wetlands and National Register eligibility. Neither suit is a collateral attack on the consent order.[7]

E. The Petitioner was not bound to appeal the injunction order.

The Respondent argues that the Petitioner was bound to appeal from the Order Granting Temporary Injunction. The Petitioner disagrees. First, the district court lacked authority to order the injunction. See discussion *supra* at pages 4-7. Its order is void. An attorney's disobedience of a void order of court is not punishable as contempt of court. 17 Am.Jur.2d Contempt § 95. Second, the terms of the injunction did not bar the activities for which she was found to be in contempt: instituting *NORAD* and *Warmsley*, attending a public hearing of the wetlands commission and writing letters to public officials.

The injunction order by its terms clearly barred Egri from prosecuting the building permit appeal. Egri *per* the Petitioner, his attorney, did not further prosecute the building permit appeal.

F. The district court's orders offend the First Amendment.

Disingenuously, Connecticut Yankee argues that Petitioner was not "prevented from appearing or speaking at public meetings or hearings of municipal bodies or liti-

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[7] To the extent that the consent order was tainted by mistake, the parties in *Connecticut Yankee* had a right pursuant to Federal Rule of Civil Procedure 60 to petition the district court to modify it. See, e.g., *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992). The Petitioner had a right under the First Amendment on behalf of her clients to inform the Selectmen that their agreement was legally impermissible, consistent with the *amicus curiae* brief filed by Connecticut Attorney General Richard S. Blumenthal, and to urge the Selectmen to file a Rule 60 motion in *Connecticut Yankee* to modify the Order on Consent of Parties on grounds of mistake.

gating matters in other courts **unless the purpose and/or effect of such activity is to impede or frustrate the [Consent] Order.**" (Emphasis added.)[8] Connecticut Yankee further states that the district court found Petitioner in contempt "specifically for her past activities 'seeking to impede construction of the ISFSI.' "

The district court did find Petitioner in contempt of court for appearing at a public hearing of the wetlands commission. However, its contempt finding was based on *argument* of Connecticut Yankee's attorneys in a factual vacuum.[9]

G. The contempt order was criminal in nature and the Petitioner was deprived of due process.

The record establishes that the district court denied Petitioner a full and fair hearing on the contempt order and penalty.[10]

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[8] By such statement, Connecticut Yankee acknowledges that the district court imposed prior restraints on Petitioner's pure speech, a constitutionally impermissible act. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1975), and that the district court imposed content-based restrictions on Petitioner's speech, an act which must withstand the strict scrutiny test or be deemed an unconstitutional abridgment of speech. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

[9] The district court did not require Connecticut Yankee's lawyers to produce a transcript to identify what speech the Petitioner had uttered which was "violative" of the injunction.

[10] The district court directed Connecticut Yankee to submit billing records to establish a monetary contempt penalty. The district court granted Petitioner's request to respond to Connecticut Yankee's submission of its attorney billing records within ten days of her receipt of the records. Connecticut Yankee failed to comply with the court's order. It submitted only an estimate of fees without documentation. The Petitioner objected. Unfortunately, by inadvertence, she was unaware that the district court then scheduled a hearing on Connecticut Yankee's request for attorney's fees and she did not attend. When she became

H. The Respondent's brief engages in inappropriate personal attack.

Respondent characterizes the Petitioner's conduct as "contumacious," involving "repeated" and "brazen" violations of the injunction.[11] As the record plainly shows, the district court erred in finding the Petitioner to have acted in contempt of the court.

Conclusion

For the reasons given, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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aware of the hearing, she filed a motion to reopen the hearing to object and she moved for reconsideration. The district court disallowed the Petitioner the opportunity to file objection to the billing records, despite its earlier order to the contrary. Given the "crippling" effect of the award, and the district court's forecast that it would order a monetary penalty that would be "burdensome," there can be no doubt that the contempt sanction was punitive in nature and that the proceedings deprived the Petitioner of due process.

[11] In the first sentence of Respondent's Counter-Statement of Case, Connecticut Yankee reports that the Petitioner has been ordered disbarred for a five-year term in the State of Connecticut. This fact has no bearing on the present issues other than to the extent that such disbarment was premised upon the district court's contempt orders in this case. See footnote 51, *Nancy Burton v. A. William Mottolese*, 167 Conn. 1, 835 A.2d 998. A stay of the decision is in effect.